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In the Supreme Court of the United States

NO. 75-1365

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

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I

The identical question of law based on identical facts is presently under consideration by this Court in the case of UNITED STATES v. MANDUJANO, U. S. Supreme Court Case No. 74-754, where this Court granted Certiorari on March 24, 1975.

II

Where Petitioner was called as a Grand Jury Witness upon an investigation focused upon him to such an extent that he was a "virtual" or "putative" defendant, for the purpose of obtaining incriminatory or perjurious testimony, and not given warnings or advice of any kind prior to his Grand Jury testimony, there was a violation of fundamental fairness as to amount to a denial of due process.

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in the
Supreme Court
of the
United States

NO. _____

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Petitioner, Jack R. Wheeler, prays that a Writ of Certiorari issue to review a final judgment and order of the Supreme Court of the State of Florida entered on

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February 26, 1976 (Appendix A and B, infra), which by its denial of the Petition for Certiorari upheld an order of the District Court of Florida, Fourth District, entered on April 25, 1975 (Appendix C, infra), affirming a judgment of conviction rendered against Petitioner in the Circuit Court of Broward County, Florida, convicting Petitioner of the crime of perjury.

JUDGMENT AND OPINION OF THE COURT BELOW

In the order of the Supreme Court of Florida entered on February 26, 1976 (set out in Appendix A and B attached to this Petition) the Court rendered no opinion and gave no reasons for its denying Petitioner's Application for Certiorari.

In its original opinion of April 25, 1975, the District Court of Appeal of Florida, Fourth District, affirmed the judgment of conviction rendered against Petitioner in the Circuit Court of Broward County, Florida, convicting Petitioner of the crime of perjury (set out in Appendix C).

JURISDICTION OF THIS COURT

1. The date of judgment to be reviewed was entered by the Supreme Court of Florida on February 26, 1976 (Appendix B).

This Petition is filed within 90 days of said order.

2. The jurisdiction of this Court is invoked, made and conferred under Title 28 U.S. Code, Sec. 1257(3) and Rule 22(1) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

Was not the Petitioner deprived of his right to protection under the Fifth Amendment of the Constitution as made applicable to the State of Florida by the Fourteenth Amendment when:

(a) Petitioner was called as a Grand Jury witness upon whom investigation was focused to such extent that he was a "virtual" or "putative" defendant and was not given full Miranda warnings prior to his testimony; and,

(b) The trial court refused to suppress Petitioner's Grand Jury testimony, although conceding Petitioner to be a "putative defendant" who had received no warnings of any kind prior to his giving Grand Jury testimony which resulted in a subsequent perjury prosecution.

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution
Fourteenth Amendment, United States Constitution

(The pertinent provisions are set out in Appendix E of this Petition.)

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STATEMENT OF THE CASE

Petitioner, Jack R. Wheeler, was subpoenaed as a witness before the Broward County Grand Jury and gave testimony which resulted in a perjury Indictment. At the pretrial level Petitioner moved to suppress his Grand Jury testimony because the investigation had focused upon him to such an extent that he was a "virtual or putative defendant", and should have been given full Miranda warnings prior to his giving testimony.

At the suppression hearing the prosecutor who conducted the Grand Jury proceedings conceded that he focused his interrogation on Petitioner, and the trial judge made a specific finding in his order that the prosecutor regarded Petitioner as a putative defendant to a charge of malfeasance but not perjury during his Grand Jury testimony. Petitioner's Motion to Suppress Grand Jury testimony was denied (Appendix D).

Petitioner was found guilty of perjury and sentenced to three years imprisonment.

Petitioner's appeal to the District Court of Appeal of Florida, Fourth District, was affirmed (Appendix C). Application for Certiorari was filed by Petitioner in the Supreme Court of Florida which was denied (Appendix A and B).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. The identical question of law based on identical facts is presently under consideration by this Court in the case of *United States v. Mandujano*, U.S. Supreme Court Case No. 74-754, where this Court granted Certiorari on March 24, 1975.

2. Where Petitioner was called as a Grand Jury Witness upon an investigation focused upon him to such an extent that he was a "virtual" or "putative" defendant, for the purpose of obtaining incriminatory or perjurious testimony, and not given warnings or advice of any kind prior to his Grand Jury testimony, there was a violation of fundamental fairness as to amount to a denial of due process.

Petitioner in the case at Bar had sought to suppress his Grand Jury testimony, which was the basis of his perjury Indictment, and the sole thrust of said motion was that the Grand Jury investigation had focused upon him to such an extent that he was a "virtual or putative defendant" and should have been given full Miranda warnings prior to his giving testimony. In denying Petitioner's Motion to Suppress Grand Jury Testimony the trial judge recognized that the prosecutor had focused his Grand Jury interrogation on Petitioner, and made a specific finding Petitioner was regarded as a putative defendant to a charge of malfeasance but not perjury, during the Grand Jury testimony.

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Petitioner relied heavily upon the case of *United States v. Mandujano*, 496 F.2d 1050 (5 CA, 1974), but notwithstanding the trial court denied Petitioner's Motion to Suppress Grand Jury Testimony (Appendix D).

In *Mandujano* the defendant was warned that he would not be required to answer questions of an incriminatory nature. (In the case *sub judice* there was no warning or advice of any kind given.) *Mandujano*, as here, filed a pretrial Motion to Suppress Grand Jury Testimony, which was granted by the District Judge, holding that a "putative" defendant who was called before a Grand Jury for the purpose of obtaining incriminatory or perjurious testimony was a violation of fundamental fairness as to amount to a denial of due process.

On appeal by the Government the Fifth Circuit Court of Appeals for the United States affirmed the action of the District Court in suppressing Mandujano's testimony in 496 F.2d 1050 (5 CA, 1974); Rehearing and Rehearing en banc was denied October 16, 1974. The Government thereafter filed a Petition for Certiorari to this Court, which was granted on March 24, 1975, in Case No. 74-754 which is still pending.

In addition to the pronouncements made by the Fifth Circuit Court of Appeals in *United States v. Mandujano*, supra, the Supreme Court of Florida in the case of *State ex rel. Lowe v. Nelson*, 210 So.2d 197 (1968), at page 199 of that opinion stated the following:

> "Therefore, at trial in the prosecution of Petitioner, if it appears incriminating testimony was taken from him in the grand jury room and such

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> testimony is sought to be introduced, it may be found inadmissible on timely objection his Miranda requirements were not complied with as a predicate to taking such testimony. *Petitioner was entitled to the Miranda warnings if he became the criminal target of the grand jury interrogation.* He also should have been advised of his right to counsel to represent him and, if not intelligently declined, he should have had counsel beside him in the grand jury room to advise him when he testified."
>
> (Emphasis ours)

Petitioner in the case *sub judice* is of the opinion that the ruling of this Honorable Court in *United States v. Mandujano*, supra, will be dispositive of the issues presented by Petitioner.

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CONCLUSION

We submit that since the facts and questions of law involved in Petitioner's claim are almost identical with those issues in *United States v. Mandujano*, supra, which is presently being considered by this Court, the two cases should be considered in tandem.

We pray that Your Honors will grant the Writ of Certiorari in similar measure as that of *United States v. Mandujano*, United States Supreme Court Case No. 74-754.

Respectfully submitted,

JOSEPH A. VARON
2432 Hollywood Boulevard
Hollywood, Florida 33020

Attorney for Petitioner

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APPENDIX

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, 1976

THURSDAY, FEBRUARY 26, 1976

CASE NO. 47,360

JACK R. WHEELER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

On consideration of the Petition for Rehearing filed by petitioner,

IT IS ORDERED that said petition is denied.

ROBERTS, OVERTON, ENGLAND, SUNDBERG AND HATCHETT, JJ., CONCUR ADKINS, C.J., AND BOYD, J., DISSENT

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. James M. Reasbeck, Judge
Hon. Joseph A. Varon
Hon. Robert L. Shevin,
Hon. George Georgieff
Hon. Thomas M. Carney
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APPENDIX B

[TITLE OMITTED]

The Motion to Stay Mandate filed by petitioner is hereby granted and proceedings in this Court and in the District Court of Appeal, Fourth District and in the Circuit Court in and for Broward County, Florida are hereby stayed to and including March 29, 1976 to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. Clyde Heath, Clerk
Hon. James M. Reasbeck, Judge
Hon. Joseph A. Varon
Hon. Robert L. Shevin,
Hon. George Georgieff
Hon. Thomas M. Carney

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APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JANUARY TERM 1975

CASE NO. 74-449

JACK R. WHEELER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Opinion filed April 25, 1975.

Appeal from the Circuit Court
for Broward County;
James M. Reasbeck, Judge.

Joseph A. Varon of Varon, Stahl
and Kay, Hollywood, for appellant.

Robert L. Shevin, Attorney General,
Tallahassee, and Thomas M. Carney,
Assistant Attorney General, West
Palm Beach, for appellee.

DOWNEY, J.

For many years appellant has been a public official in Broward County. On September 26, 1973, the Broward

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County grand jury indicted appellant for perjury in connection with testimony he gave before the grand jury during its investigation of the conduct of appellant's public office.

Appellant testified before the grand jury that in February 1969 appellant and his wife entered into a written employment contract pursuant to which his wife would work in his office for a period of five years at a specified annual salary. Appellant identified a written document presented to him as the contract in question. The indictment in question charged that appellant committed perjury when he gave the foregoing testimony because he knew it was false and because it pertained to a material matter the grand jury was investigating, namely, appellant's employment of his wife while he was a public official. Appellant was tried by a petit jury, convicted of perjury and sentenced to three years imprisonment.

Appellant suggests five points requiring reversal, only three of which require comment: (1) he was not advised of his constitutional rights before testifying before the grand jury; (2) the indictment was invalid because more than one assistant state attorney appeared simultaneously before the grand jury while testimony was being adduced; (3) the state failed to prove the allegedly false testimony was material to the grand jury inquiry.

Under point one appellant complains that he was not advised of the nature of the grand jury's inquiry, nor was he given any Miranda warnings prior to testifying. However, this point is without merit. A witness testifying before a grand jury or prosecuting attorney does not have

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a right to be advised of the nature of the inquiry before testifying. Dinnen v. State, Fla.App. 1964, 168 So.2d 703; In re Black, 47 F.2d 542, (2nd Cir. 1931); United States v. Schaier, 175 F.Supp. 838, 842 (S.D.N.Y. 1959). Nor is a witness appearing before a grand jury entitled to the usual Miranda warnings. State ex rel. Lowe v. Nelson, Fla.App. 1967, 202 So.2d 232, affirmed Fla. 1968, 210 So.2d 197.

Appellant's second point that the indictment was defective because several assistant state attorneys simultaneously attended the grand jury during presentation of testimony was based upon the construction the District Court of Appeal, First District, placed upon §§ 905.17 and 905.19, F.S. in State ex rel. Christian v. Rudd, Fla. App. 1974, 302 So.2d 821. However, the Supreme Court rejected that interpretation of §§ 905.17 and 905.19, F.S. 1973, and held that said sections authorized the presence of more than one qualified assistant state attorney to be present at grand jury sessions. Rudd v. State ex rel. Christian, Fla. 1975, ___ So.2d ___, opinion filed February 10, 1975. Thus, it appears appellant's second point is ill-founded.

Appellant's third point is more troublesome. By appropriate assignments of error and argument in his brief, appellant contends that the evidence adduced at trial was insufficient for the petit jury trying the case to determine whether appellant's grand jury testimony was material to the grand jury inquiry.

The law is well established in this jurisdiction that one of the essential elements of the crime of perjury is that the false testimony must be on a material point. 25

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Fla. Jur:, Perjury, §6. In the case of false testimony before a grand jury, the testimony must be material to the subject matter about which the grand jury is inquiring. Gordon v. State, Fla. 1958, 104 So.2d 524, 530-531. Accordingly, the indictment must explicitly describe the matter which was being investigated by the grand jury, and as to which the witness was testifying when he gave the false testimony. 25 Fla. Jur., Perjury, §29. As with other essential elements of any crime, the state must at the trial of the perjury charge prove the materiality of the false testimony. Unlike the essential elements of other crimes, the determination of whether materiality has been sufficiently proven is generally a question of law for the court. Wolfe v. State, Fla. 1972, 271 So.2d 132.

In the case at bar the trial judge submitted the question of materiality to the jury upon appropriate instruction for their decision even though in this case, there being no evidentiary conflict, it was a question of law for the court. The jury by its verdict obviously found appellant's testimony was material to the grand jury's inquiry. Appellant is hardly in a position to complain about the court's submission of the materiality issue to the jury because, as Judge Cowart noted in Wilson v. State, Fla. App. 1973, 284 So.2d 24, such submission, even if erroneous, favored appellant. This is so because the state was thereby given the additional task of satisfying the jury as to the materiality issue when the trial judge had determined the testimony to be legally material to the grand jury inquiry by twice denying appellant's motions for judgment of acquittal, which motions were based in part upon the contention that materiality had not been proven.

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All of which brings us to the main question involved here: Was the evidence adduced at trial sufficient to show the nature of the inquiry at the time appellant testified before the grand jury? To bring the issue into sharper focus, it seems to us there can be no question that appellant's testimony regarding the date of the employment contract with his wife was quite material to the grand jury inquiry if the subject matter of that inquiry was the manner in which appellant conducted the operation and management of his public office. When testimony is capable of misleading, influencing, or even deterring a grand jury in the conduct of its investigation, it is material. State v. Deets, Iowa 1972, 195 N.W.2d 118. Thus, if the contract was executed in 1969 for a period of five years, as appellant testified in the grand jury proceedings, the employment of his wife in the county comptroller's office would not violate §116.111, F.S. (the anti-nepotism statute), as such employment would have predated the effective date of the statute (January 1, 1970). While the state could certainly have presented a fuller and more complete explanation of the nature of the grand jury's investigation, the total record convinces us the petit jury knew exactly what the grand jury was investigating and was adequately apprised of the subject matter of the investigation so as to determine that appellant's testimony was material thereto.

In its opening statement the state advised the jury that it would prove that at the time in question the Broward County Grand Jury was in the midst of an investigation into alleged improprieties of the appellant's office, including certain employment and payroll practices in that office. The state suggested it would prove appellant's testimony before the grand jury to the effect that he signed an

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employment contract with his wife in 1969 was false and was given for the purpose of avoiding prosecution under the anti-nepotism law, which became effective January 1, 1970. It further proposed to prove that the stationery on which the contract was prepared was not printed until after January 1, 1970, since it bore a picture of the new courthouse addition, which picture was not taken until December 1971.

Of course, what counsel says in his opening statement is not evidence and cannot be used in our determination of whether or not the proof was adequate to show the subject matter of the grand jury inquiry. But the opening statement of counsel is important to apprise the jury of the issues involved in the trial and of the matters which he expects to prove. It also facilitates the jury's understanding of the evidence as it unfolds. Moreover, the state did adduce evidence to support the opening statement.

The Forewoman of the Broward County Grand Jury testified she personally placed appellant under oath on September 25, 1973. In addition, she identified the contract between appellant and his wife dated February 4, 1969, as being the one which appellant identified in his testimony before the grand jury. She also stated that appellant's testimony concerned that particular contract which the grand jury became interested in "when we started with the testimony about things in the office, and when we got into this contract the date was important." She stated further that the date was important since appellant had said it was signed in 1969; but if it had been signed after 1970 it would have been in violation of the nepotism law. When the prosecutor asked her:

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> "How was that [the date of the contract] important to what the Grand Jury was investigating?"

the witness answered:

> "Well, this was violation of the nepotism law, if it was signed after—I think the date was '70—I am not sure of the month, and by the hiring of his wife and with this contract of 1969 that would have been the grandfather clause, and that would have raised the nepotism law."

Mr. Jenne, the assistant state attorney in charge of the grand jury investigation, testified at trial that the grand jury was "looking into the Comptroller's office. Jack Wheeler was the incumbent responsible for his office." Jenne testified further that they were investigating appellant for nepotism, and appellant's statement to the grand jury precluded any indictment for violation of the nepotism statute because according to appellant's testimony the contract with his wife would predate the statute. Jenne also testified that initially the state attorney's office decided that a full investigation of appellant's office would best be presented to a grand jury. And so when the grand jury began its inquiry, the "areas" of inquiry concerning appellant's office were nepotism, financial records, unlawful overtime payments to certain employees, loan sharking, and other matters of impropriety.

Mr. Butterworth, another assistant state attorney involved in the grand jury probe, testified that three successive grand juries were investigating appellant's office; that they referred to it as the "Wheeler investigation"; that they subpoenaed large quantities of records from

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appellant's office; and that they looked into bank records, bonus monies, various trips and other matters involved in appellant's office. There came a time during this investigation, Butterworth stated, when several of the assistant state attorneys discovered that there was a discrepancy between the physical appearance of the courthouse picture on the stationery used for the February 4, 1969 contract in question and the actual physical appearance of the courthouse on that date. The stationery picture portrayed a ten story courthouse, whereas in 1969 the courthouse had only six stories.

It would unduly protract this opinion to further elaborate on the testimony which we find sufficient to prove the subject matter of the grand jury's investigation so as to demonstrate the materiality of appellant's testimony. Suffice it to say that in our judgment the transcript of the trial proceedings shows that the evidence was adequate to prove that issue.

Accordingly, the judgment and sentence appealed from is AFFIRMED.

OWEN, C.J., and BROWN, CECIL H., Associate Judge, concur.

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APPENDIX D

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

No. 73-1989 Reasbeck

STATE OF FLORIDA

vs.

JACK R. WHEELER,

Defendant.

[Filed February 19, 1974]

ORDER DENYING DEFENSE MOTIONS

The Court having taken testimony and considered Briefs in connection with Defendant's Motion to Dismiss the Indictment and Motion to Suppress Grand Jury Testimony, given by Defendant on September 25, 1973, finds

That Assistant State Attorney JENNE regarded Defendant JACK WHEELER as a putative Defendant to a charge of Malfeasance but not Perjury when the said Defendant testified on September 25, 1973. For that reason there was no necessity to administer any constitutional warnings to the Defendant at the time of the taking of his Grand Jury testimony.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress Grand Jury Statement be and the same is hereby denied.

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IT IS FURTHER ORDERED that Defendant's Motion to Dismiss Indictment is also denied, but that the Defendant is hereby granted the right and privilege to hold an evidentiary hearing at any convenient time during the course of the trial, or immediately thereafter, for the purpose of ascertaining whether there were three Assistant State Attorneys present at one time, during the sessions of the Grand Jury which indicted Defendant.

DONE AND ORDERED at Fort Lauderdale, Florida, this 19th day of February, 1974.

/s/ James M. Reasbeck

Circuit Judge

Copies to:

def. atty.
St. Atty.

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APPENDIX E

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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SUPREME COURT OF THE UNITED STATES

CASE NO. 75-1365

JACK R. WHEELER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 75-1365

JACK R. WHEELER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO PROTECTION UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION AS MADE APPLICABLE TO THE STATE OF FLORIDA BY THE FOURTEENTH AMENDMENT:

(a) WHETHER "MIRANDA TYPE" WARNINGS MUST BE GIVEN TO A GRAND JURY WITNESS WHO IS CALLED TO TESTIFY ABOUT CRIMINAL ACTIVITIES IN WHICH HE MAY HAVE BEEN PERSONALLY INVOLVED? (RESTATED)

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(b) WHETHER, IN THE ABSENCE OF CAUTIONARY INSTRUCTIONS, FALSE STATEMENTS MADE TO THE GRAND JURY MUST BE SUPPRESSED IN A PROSECUTION FOR PERJURY BASED ON THOSE STATEMENTS? (RESTATED)

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution guarantees every person the privilege against compulsory self-incrimination. It provides in pertinent part:

> "No person *** shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law***."

The Fourteenth Amendment of the United States Constitution imposes the Fifth Amendment upon the States.

STATEMENT OF THE CASE

Respondent generally accepts Petitioner's Statement of the Case insofar as it is accurate, non-argumentative and supported by the correct reference to a portion of the State Court Record.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, which affirmed Petitioner's conviction and sentence on April 25, 1975, is reported at 311 So.2d 713 (4DCA Fla. 1975) (Petitioner's Appendix C, A 4-11).

Petitioner's Petition for Writ of Certiorari in the Supreme Court of Florida and Petition for Rehearing was denied by Order of the Court without opinion on February 2, 1976, and has not yet been reported (Petitioner's Appendix A and B, A 1-3).

JURISDICTION

Petitioner in his jurisdictional statement in the Petition for Writ of Certiorari has accurately set forth the applicable statutory and court rules which would authorize the present application for Writ of Certiorari by this Court.

However, the issuance of a Writ of Certiorari by this Court is an act done only when the case before it clearly presents special and important reasons therefore (Rule 19 of the Rules of the Supreme Court of the United States). Respondent believes Petitioner's case is not one establishing any compelling reasons for this Court's assumption of jurisdiction and the issuance of the Writ of Certiorari, in view of the fact that the issues Petitioner raises are identical

to those recently ruled upon by this Court in United States v. Mandujano, ___U.S.___, Case No. 74-754, decided May 19, 1976. It is Respondent's contention that the Mandujano decision is dispositive of the questions presented in the instant case, and that the holding in Mandujano would affirm Petitioner's judgment and conviction Thus, Respondent would submit that this case involves no new or claimed new principle of law nor any determination by a State Court of any federal question.

ARGUMENT

In an attempt to have this Court erode the broad investigatory powers which have been accorded to grand juries, Petitioner asserts that as a predicate to testifying before that body, Miranda warnings must necessarily be given to a "putative defendant." He contends further that the failure to give such warnings must result in the suppression of any false statements made by the witness to the grand jury in a subsequent perjury prosecution based on those statements. In support of this position, Petitioner primarily relies on the decision of the United States Court of Appeals of the Fifth Circuit in United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), which was being considered by this Court, under Case No. 74-754, at the time Petitioner filed the instant Petition for Certiorari.

Petitioner, in challenging his perjury conviction, in effect asks whether the warnings called for by Miranda v. United States, 384 U.S. 436 (1966), must be given to a grand jury witness who is called to testify about criminal activities in which he may have been personally involved; and, whether absent such warnings, false statements made to the Grand Jury must be suppressed in a prosecution for perjury based on those statements. Finding this to be the identical question of law based on essentially the identical facts as Mandujano, Petitioner suggests that this Court's resolution of the issue in Mandujano will be dispositive of the case sub judice. Respondent agrees.

The factual situation involved in Mandujano, differs from the instant case only slightly. Defendant Mandujano was called before a grand jury investigating illegal drug traffic. The witness, a target of the investigation, gave false statements to the grand jury and was subsequently indicted for perjury. Prior to trial, the defendant moved to suppress his grand jury testimony based on inadequate Miranda warnings. The Motion was granted by the trial court which held that the defendant, when called before the grand jury had been a "putative" or "virtual" defendant and therefore was entitled to full Miranda warnings prior to testifying.

The United States Court of Appeals, for the Fifth Circuit, in affirming the lower Court's ruling found 1) that a

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putative defendant may not be called to testify before a grand jury without being given full Miranda warnings, and be necessary implication, that such an individual has an absolute right to remain silent (i.e. to refuse to give any testimony whatsoever, whether or not incriminating) and also a right to appointment of counsel; 2) that Petitioner was, at the time he was called to testify before the grand jury, a "putative defendant"; and 3) that it is appropriate to suppress the perjurious testimony of a putative defendant who has not been given full Miranda warnings. United States v. Mandujano, 496 F. 2d 1050 (5th Cir. 1974).

Certiorari was granted and (perhaps to the chagrin of Petitioner) this Court on May 19, 1976, rendered its decision, reversing the ruling of the Court of Appeals.

The majority opinion, authored by Mr. Chief Justice Burger, holds that there is no requirement that Miranda warnings be given to any grand jury witness being called to testify about criminal activities in which he (witness) may have been personally involved. Further, the Court found that the failure to give these warnings does not violate either the self-incrimination privilege or due process requirement. Therefore, the opinion concludes, the absence of cautionary instructions will not preclude the use of any and all false statements made to the grand jury in a subsequent prosecution of the witness whether considered a putative

defendant or mere witness) for perjury based on those statements. United States v. Mandujano, ___ U.S. ___, supra.

Respondent contends that this Court's holding in Mandujano, will affirm Petitioner's State conviction. Comparing the factual situations, the similarities are readily seen. The primary difference is in the fact that in Mandujano, the defendant was given some cautionary instructions, while Petitioner was given none. It might appear that this difference is crucial, however, Respondent contends otherwise.

In Mandujano, this Court makes no distinction between minimal Miranda warnings and the total absence of them. In reversing the decision of the Court of Appeals, this Court cited with approval the language of United States v. Orta, 253 F.2d 312 (5th Cir. 1958), which held that:

> "...the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned before a Grand Jury." United States v. Mandujano, ___U.S.___, at 6.

In its holding in Mandujano, this Court, finding that Miranda warnings are not required for grand jury witnesses (as opposed to their necessity prior to custodial interrogation), emphasized the

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role of the grand jury in our system of criminal justice and distinguished it from custodial interrogation.

The grand jury has been vested with substantial and broad investigative powers. "Its responsibilities continue to include...the protection of citizens against unfounded criminal prosecutions." United States v. Calandra, 414 U.S. 338, 343-344 (1974), and the scope of its powers continues to reflect its "special role in insuring fair and effective law enforcement: (ibid). See also, Branzburg v. Hayes, 408 U.S. 665, 686-700 (1972). Among its many powers, is the grand jury's authority to compel the attendance and testimony, Kastigar v. United States, 406 U.S. 441, 443 (1972), in addition to its authority and ability to compel the production of evidence. United States v. White, 322 U.S. 694 (1944). United States v. Mandujano, ___ U.S. ___ at 7. Precisely because of its special constitutional role (and in sharp contrast to custodial police interrogation), "the long standing principle that 'the public...has a right to every man's evidence'... is particularly applicable to grand jury proceedings" Branzburg v. Hayes, supra at 688), where the duty to testify has long been recognized as a basic obligation that every citizen owes to his government. Blackmer v. United States, 284 U.S. 421, 438 (1932).

> "the grand jury's authority to compel testimony is not, of course without limits.

> The same Amendment that establishes the grand jury also guarantees that 'no person ... shall be compelled in any criminal case to be a witness against himself....' The duty to give evidence to a grand jury is therefore conditional; every person owes society his testimony, unless some recognized privilege is asserged.
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> Under settled principles, the Fifth Amendment does not confer an absolute right to decline to respond in a grand jury inquiry; the privilege does not negate the duty to testify but simply conditions that duty. 'Ordinarily, of course, a witness has no right of privacy before the grand jury.' Calandra, supra at 353." United States v. Mandujano, ___U.S.___ at 7-8.

While witnesses called by a grand jury are legally bound to give testimony, Calandra, supra at 343, the Fifth Amendment privilege against self-incrimination may be asserted during proceedings before a grand jury. Counselman v. Hitchcock, 142 U.S. 547 (1892). A witness can also

> "be required to answer before a grand jury so long as there is no compulsion to answer questions that are self incriminating.... The witness must invoke the privilege, however, as the 'Constitution does not forbid the asking of criminative questions.' United States v. Monia, 317 U.S. 424 at 433 (Frankfurter, J. dissenting).
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> 'The (fifth) Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment.' 317 U.S. 427.
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> Absent a claim of the privilege, the duty to give testimony remains absolute." United States v. Mandujano, ___ U.S. ___ at 10.

When Petitioner was subpoenaed to appear before the grand jury, he had no right to be informed, prior to testifying,

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that his testimony might be used against him. The right presupposes a question and an assertion of the right on the basis of the content of the question. McCarthy v. Arndstein, 266 U.S. 34 (1924); Hoffman v. United States, 341 U.S. 479 (1951).

Even assuming that a grand jury witness could not have voluntarily waived his right against self-incrimination, such lack of voluntarily waiver would not preclude prosecution for perjury committed in his testimony before a grand jury. United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); cf., Glickstein v. United States, 222 U.S. 139, 142 (1911). Beyond this, it has been held, in refusing to permit a witness' attempt to protect perjured testimony that "the Fifth Amendment privilege cannot be construed to include the right to commit perjury." Harris v. New York, 401 U.S. 22, 225 (1970).

United States v. Orta, cited with approval by this Court in Mandujano, held that even though a witness had not voluntarily waived his Fifth Amendment rights, he could not thereafter commit perjury with impunity, as the protection of the Fifth Amendment only relates to crimes alleged to have been committed before the time when the testimony is sought. United States v. Orta, 253 F.2d 312 (5th Cir. 1958), cert.den. 357 U.S. 905 (1958).

Furthermore, in United States v. DiGiovanni, 397 F.2d 409 (7th Cir. 1968), cert den. 393 U.S. 924 (1968) the court

held that failure to give Miranda warnings to a grand jury witness, including one as to whom the proceedings have become accusatory, does not bar perjury prosecution for allegedly false testimony before that grand jury.

> "in this constitutional process of securing a witness' testimony, perjury simply has no place whatsoever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." United States v. Mandujano, ___ U.S. ___ at 11.

Sanctions for false statements or perjury have consistently been allowed by this Court. See e.g. Bryson v. United States, 391 U.S. 64 (1969).

> "The shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." Oregon v. Hass, 420 U.S. 714, 723 (1975).

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In this light, it has been ruled that perjured statements fall outside a statutory grant of blanket immunity from the further use of that testimony. See Glickstein v. United States, supra.

> "It cannot be thought that as a general principle... a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them." Bryson v. United States, supra at 72.

Although grand jury witnesses may be advised of the nature and scope of the inquiry, such has not been considered a fundamental right in Florida. Dinnen v. State, 168 So.2d 703 (2DCA Fla. 1964). Further, the Judiciary of this State has found no requirement for a witness to be warned that if he fails to testify truthfully, he may suffer the pain of a perjury conviction, his oath being sufficient notice. Gordon v. State, 104 So.2d 524, 532 (Fla. 1958).

Petitioner's contentions revolve around his assertion that he was a putative defendant, thus Miranda warnings were required. While Respondent does not concede that Petitioner was indeed a putative defendant, the trial court found

that the investigation centered on him. The facts indicate, not that Petitioner was the only target of the investigation, but rather at the time he appeared before the grand jury, it was to determine if there had been any violation of Florida's anti-nepotism statute, Section 116.111, Florida Statutes, and whether malfeasance had been committed, contrary to Sections 839.11 and 839.13, Florida Statutes. Clearly the crime of perjury had not yet been committed.

Petitioner's claim that he was a "putative defendant" will have absolutely no bearing on the validity of his perjury conviction. United States v. Mandujano, ___ U.S. ___, supra. No impropriety results from the calling, by the grand jury, of a target of its investigation. "The obligation to appear (before the grand jury) is no different for a person who may himself be the subject of the grand jury inquiry." United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973). Once called, his responses are presumed to be as voluntary as those of any other witness.

> "The fact that here the grand jury interrogation had focused on some ... specific activities does not require that these important principles be jettisoned; nothing remotely akin to 'entrapment' or abuse of process is suggested by what occured here." Mandujano, supra at 19.

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Asserting a requirement for Miranda warnings, in effect equates an appearance before a grand jury with police interrogations of a person in custody. Miranda v. United States, supra at 444, n.4. The two are simply not equal. Clearly, the Miranda warnings were never intended to create a "constitutional straitjacket" Miranda, supra at 467, to be applied across the board to every form of official questioning.

> "Miranda addressed extra-judicial confessions or admissions procured in a hostile, unfamiliar environment which lacked procedural safeguards. The decision expressly rested on the privilege against compulsory self-incrimination; the prescribed warnings sought to negate the 'compulsion' thought to be inherent in police station interrogation. But the Miranda Court simply did not perceive judicial inquiries and custodial interrogation as equivalents."
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> "The Court thus recognized that many official investigations, such as grand jury questioning, take place in a setting wholly different from custodial police interrogation.... To extend these concepts to questioning before a grand jury inquiring

> into criminal activity under the guidance of a judge is an extravagant expansion never remotely contemplated by this Court in Miranda; the dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court. United States v. Mandujano, ___ U.S. ___ at 14-15.

The interpretation of Miranda which Petitioner asserts,

> "would require that the witness be told that there was an absolute right to silence, and obviously there is no such right before a grand jury.... (A) grand jury witness... has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim. United States v. Mandujano, supra at 16.

Following the holding in Mandujano, Petitioner's contentions must necessarily fail.

Each facet of the central question Petitioner has raised has been expressly repudiated by the Court. Thus there is no basis for the suppression of Petitioner's

statements before the grand jury. Perjury is simply not excusable on Fifth Amendment grounds. In making the false statements, the Petitioner took a "course other than the one that the statute was designed to compel, a course that the Fifth Amendment gave him no privilege to take..." Bryson v. United States, supra at 82. Rather than inculpate himself in a criminal act occurring in the past, the defendant had in effect committed a new criminal act. "When (he) responded to the pressure under which he found himself by communicating false information this was simply not testimonial compulsion." Ibid. Therefore, there is no basis for the suppression of Petitioner's statements.

Finally, Respondent submits that the facts involved in the instant case so closely resemble those in Mandujano, that, premised upon this Court's holding in Mandujano, the decision of the State Court must be affirmed.

Petitioner was properly called before the grand jury. While he may have been a target of that body's investigation, the inquiry was into possible criminal activities of Petitioner, i.e. malfeasance of a public official and a violation of the State's anti-nepotism statute. Petitioner was, clearly, not being investigated for perjury. It therefore follows that there is no basis whatsoever, for the suppression of his false statements made before the grand jury. Lest it be forgotten, "A witness, sworn to tell the truth before a

duly constituted grand jury will not be heard to call for the suppression of false statements made to that jury." United States v. Mandujano, __U.S.__ at 17-18.

CONCLUSION

WHEREFORE, the decision of the State Courts should be affirmed and the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondent in Opposition has been furnished this _____ day of June, 1976, to Honorable Joseph A. Varon, Varon, Stahl & Kay, 2432 Hollywood Boulevard, Hollywood, Florida 33020.

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